NO. 49069-2-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

LLRIG TWO, LLC, et al

Respondents,

v.

LEE and LORI WILSON,

Appellants.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This is an appeal of an order granting summary judgment determining that LLRIG TWO, LLC is the owner of two (2) promissory notes with a principal balance of $3,367,000.00 that were acquired from Sterling Bank (hereinafter the "Notes") along with the Deed of Trust securing the Notes, (hereinafter the "Deed of Trust"). (CP 251-252) (CP 274) The party appealing the decision is RV Resort Management, LLC, (hereinafter "RV"). (CP 274) RV has filed the appeal even though the summary judgment order being appealed also determined that the attempted transfer of the Wilson interest in the Lost Lake Resort Investment Group LLC, the other claimant to the Notes and Deed of Trust to RV, was void and that RV has no beneficial interest in the Notes or Deed of Trust. (CP 251-242) The portion of the summary judgment order determining that the attempted transfer of the Notes and Deed of Trust to RV was void and determining that RV has no interest in the Notes or the Deed of Trust has not been appealed. (CP 274) Lee and Lori Wilson who, as owners of 49% of Lost Lake Resort Investment Group LLC, claimed a beneficial interest in the Notes and Deed of Trust prior to the summary judgment ruling, have not appealed the ruling. (CP 274)

II. COUNTER-STATEMENT OF THE CASE

The two (2) Notes totaling $3,367,500.00 and Deed of Trust securing the notes were originally executed in 2007 by Jeff Graham through Lost Lake Resort LLC, the owner and developer of an approximately 200-unit RV park known as Lost Lake Resort. In 2010, Jeff Graham filed personal bankruptcy. (CP 213) At the time he filed the bankruptcy, Mr. Graham owned Lost Lake Resort, LLC, a limited liability company, that owned the 85-acre RV park property. (CP 213) Since he owned the LLC, the LLC was an asset of his bankruptcy estate managed by the bankruptcy trustee. (CP 213)

The 85-acre resort parcel held by Mr. Graham's limited liability company, Lost Lake Resort, LLC, was the property encumbered by a Deed of Trust securing the Notes then held by Sterling Savings Bank. (CP 213) With interest, the balance on the Notes documents was well in excess of the principal balance of $3,367,500.00. (CP 214)

In 2010 when he filed his personal bankruptcy, Mr. Graham also owned another limited liability company, Lost Lake Development LLC. (CP 212) That company owned 56 undeveloped acres of property adjacent to the 85-acre Lost Lake

Resort property. (CP 212) The 56 acres were encumbered by a Deed of Trust that was held by a group of investors who, through an LLC formed to make the loan to Graham secured by the 56-acre property, had loaned money to Graham and held notes and a deed of trust securing the notes encumbering the 56 acres. (CP 212) The LLC formed to make the loan to Graham against the 56-acre parcel was the Lost Lake Resort Investment Group, LLC. That LLC was owned 51% by investors Block, McCausland, Monette, and Deutsch and 49% by Lee and Lori Wilson. (CP 212-CP 213) At the time Graham personally filed bankruptcy, Lost Lake Development LLC, the owner of the 56 undeveloped acres also filed bankruptcy. (CP 213)

In April 2012, while the Lost Lake Resort, LLC and its 85 acres of property were assets subject to bankruptcy court control in the Graham bankruptcy, defendant, Attorney J. Mills, at the instruction of Jeff Graham, made an oral offer, from Lost Lake Resort Investment Group, LLC to purchase the Sterling Bank Notes and Deed of Trust for a price of $500,000.00. (CP 213-214) Jeff Graham had no interest in Lost Lake Resort Investment Group, LLC and Mr. Mills knew that Mr. Graham had no authority to direct Mr. Mills to make an offer on behalf of the LLC. (CP 213-214)

Defendant Mills did not consult with anyone from Lost Lake Resort Investment Group, LLC before he made the oral $500,000.00 offer on behalf of the LLC to purchase the Sterling Bank Notes and Deed of Trust. (CP 214) To the surprise of Defendant Mills, Sterling Bank accepted the unauthorized $500,000.00 offer to purchase the Notes and Deed of Trust by the Lost Lake Resort Investment Group, LLC. (CP 214) Defendant Mills then informed Block and McCausland that Sterling Bank had agreed to sell the Notes and Deed of Trust for $500,000.00. (CP 214) Plaintiffs Block and McCausland, who had no idea that the offer had been made in the name of the Lost Lake Resort Investment Group, LLC, told Mr. Mills that they wanted to buy the Notes and Deed of Trust individually. (CP 214) Defendant Mills initially assured them that the purchase could be by them individually or by a new company to be formed by Block and McCausland. (CP 214)

On April 24, 2012, at the direction of Mills, Block and McCausland wired their own funds of $500,000.00 to Sterling Bank to purchase the Notes and Deed of Trust. (CP 214) After the money was wired, defendant Mills notified the Bank by a phone call to the legal assistant to the Bank's attorney that Block and McCausland were buying the note in a company that they were

going to form. (CP 21, Supplemental Clerk's Papers (SCP) Pending, Exhibit E) Later, on April 24, 2012, the Bank's attorney e-mailed Mr. Mills declining to change the buyer from Lost Lake Resort Investment Group, LLC who Mills had represented was the buyer. (CP 21, SCP Pending, Exhibit E) That e-mail from the Bank's attorney indicated that the Bank had *no objection* to Lost Lake Resort Investment Group, LLC assigning the Notes and Deed of Trust to another entity, after they were purchased from the Bank. (CP 21, SCP Pending, Exhibit E) Defendant Mills told Block and McCausland that the Bank was requiring the purchaser of the Notes to be Lost Lake Resort Investment Group, LLC but that Lost Lake Resort Investment Group, LLC could transfer the Notes to an entity belonging to Block and McCausland as soon as they were purchased from the Bank. (CP 21, SCP Pending, Exhibit E) As a result, McCausland executed the purchase of the Notes and Deed of Trust in the name of Lost Lake Resort Investment Group, LLC with the understanding from Mills that they would be assigned to their newly formed limited liability company shortly after purchase. (CP 211, SCP Pending, Exhibit D)

On May 16, 2012, after the assignment from the Bank had been recorded, Defendant Mills reiterated in writing to Block and

McCausland what he had told them orally at the time of the execution of the purchase agreement, that immediately after purchase the Notes and Deed of Trust could be transferred from the Lost Lake Resort Investment Group, LLC to a new company formed by Block and McCausland. (CP 211, SCP Pending, Exhibit G) In conformity with that discussion and plan, LLRIG TWO, LLC was formed. (CP 215)

By June 27, 2012, Block and McCausland agreed to purchase Lost Lake Resort, LLC, the company that owned the 85-acre developed RV resort from the Bankruptcy Trustee in the Graham bankruptcy. (CP 216) By purchasing the limited liability company, Block and McCausland owned the entity that held title to the 85-acre resort parcel that had been subdivided into lots. (CP 216) On June 27, 2012, an assignment of the Sterling Bank Notes and Deed of Trust from Lost Lake Resort Investment Group, LLC to the newly formed LLRIG TWO, LLC that had been prepared by Mills as planned at the time of the purchase of the Notes and Deed of Trust, was executed. (CP 215-216) LLRIG TWO, LLC was wholly-owned by Block and McCausland. (CP 215) After the assignment of the Notes and Deed of Trust and the purchase of Lost Lake Resort, LLC by Block and McCausland was completed,

defendant Mills, acting under oath as agent for both Lost Lake Resort, LLC and LLRIG TWO, LLC, executed a Deed in Lieu of Foreclosure from Lost Lake Resort, LLC to LLRIG TWO, LLC. (CP 211, SCP Pending, Exhibit H) The excise tax affidavit signed by defendant Mills as the representative of both the grantor and grantee states under oath that LLRIG TWO, LLC was receiving title in lieu of a foreclosure of a Deed of Trust held by LLRIG TWO, LLC encumbering the 85 acres of Lost Lake Resort LLC property. (CP 211, SCP Pending, Exhibit H) The only Notes and Deed of Trust held by LLRIG TWO, LLC were the Sterling Bank Notes and Deed of Trust. (CP 216)

No other activity related to the ownership of the Sterling Bank Notes and Deed of Trust took place after the assignment of the Notes and Deed of Trust to LLRIG TWO, LLC prior to April 1, 2013. Although several things took place after April 1, 2013 regarding the Notes and Deed of Trust, in litigation in Pierce County Cause Number 14-2-06976-1, the parties to this litigation entered a signed stipulation that the ownership of the Notes and Deed of Trust in this action would be determined based on facts and events that had occurred as of April 1, 2013. (CP 211, SCP Pending, Exhibit C) At that time, RV had no interest in the Notes and Deed

of Trust either directly or beneficially. (CP 211, SCP Pending, Exhibit C) Thus, pursuant to the stipulation, RV cannot be the owner of the Notes and Deed of Trust. (CP 211, SCP Pending, Exhibit C)

Plaintiffs LLRIG TWO, LLC, Lost Lake Resort, LLC, Block and McCausland moved for summary judgment on July 10, 2015 in this action determining either that the Notes and Deed of Trust are owned by LLRIG TWO, LLC based on one of three theories, or, in the alternative, that the Notes were extinguished by the Deed in Lieu of Foreclosure recorded in 2012. (CP 209) The moving parties supported the summary judgment motion with declarations of Brent McCausland, Gary Monette and Tom Deutsch. (CP 211), (CP 43), (CP 44), (CP 249). Defendants RV and Wilson did not provide the court with any evidence by declaration or otherwise to oppose the motion and the facts presented by the moving parties were not contested. The entire response of RV and Wilson to the motion asking that the court find that LLRIG TWO, LLC owned the Notes and Deed of Trust because of the June 27, 2012 assignment of the Notes and Deed of Trust by the Lost Lake Resort Investment Group, LLC to LLRIG TWO stated:

Part B argues that Mr. McCausland, as manager was authorized by the Operating Agreement to transfer the notes to his wholly owned company, LLRIG TWO and that the lack of consent by Mr. Wilson is irrelevant.

This argument totally ignores part 7.6 of the Operating Agreement, which says:

> **7.6 No Right to Property.** No Member shall have any right to demand or receive any distribution from the Company in any form other than cash, upon dissolution or otherwise.

Under this Agreement, whatever Mr. McCausland as manager had authority to do, he didn't have authority to take the notes. At most, he would have to liquidate the notes, and make a distribution.

More fundamentally, this just misreads part 7.3(e) of the agreement. Part 7.3 provides that to ratify a conflicted transaction requires a vote of the membership. Plaintiffs assert that they got a majority vote of the membership. But, this provision, to make any sense at all, requires an affirmative vote of the *dis-interested* members. If a majority of conflicted members can ratify their own conflicted transaction, then the provision on conflicts is no protection to any member.

Plaintiffs' reading of the Operating Agreement would simply undercut and make meaningless all of the fiduciary duties owed to minority members and would totally gut minority rights by allowing a majority to approve their own conflicted action. The Agreement doesn't do that, and doesn't allow for a transfer of $5 million in bank notes by Mr. McCausland into his own pocket without the consent of Mr. Wilson.

(CP 248, p. 2-3)

The Court rejected both arguments and granted summary judgment ruling that LLRIG TWO, LLC owned the Notes and Deed of Trust. (CP 251) That ruling did not dismiss claims made by defendants Wilson for a money judgment for breach of fiduciary duty by McCausland for transferring the Notes and Deed of Trust to LLRIG TWO, LLC, but it did finally determine the ownership of the Notes and Deed of Trust, subject to this appeal. (CP 251)

III. ARGUMENT

A. Standard of Review

The standard of review by this court of an order granting summary judgment is *de novo* based upon the record considered by the Trial Court. *Green v. Cmty Club*, 137 Wn. App., 665, 151 P. 3d 1038 (2007), *Drinkwitz v. Alliant Techsystems, Inc.* 140 Wn. 2d, 291, 996 P. 2d 582 (2000). The record considered in making the summary judgment decision is properly listed in the summary judgment order and based on the documents listed in that order. RAP 9.12.

B. Appellant's arguments asserted on appeal are new, not properly before this Court, not supported by the record on summary judgment of December 18, 2015 and should be rejected and the Trial Court's order affirmed.

Virtually every argument contained in Appellant's opening brief was not made in the Trial Court. This court should, therefore, not consider them. RAP 2.5(a), *Dept. of Ecology v. Tiger Oil Corp*, 166 Wn. App. 720, 271 P. 3d, 331, (2012), *MHM&F LLC v. Pryor*,168 Wn. App. 451, 277 P. 3d, 62 (2012). In the Trial Court, the entire argument of RV on the issue of the propriety of the transfer of the Notes and Deed of Trust from Lost Lake Resort Investment Group, LLC to LLRIG TWO, LLC, is contained in the only pleading filed in response to the summary judgment. (CP 247) There, at page 2 line 17 to page 3, line 18 of the Response, RV made two arguments why the transfer of the Notes and Deed of Trust was not valid. With that background, the response of LLRIG TWO, LLC and the other Plaintiffs to the Appellant's opening brief is as follows.

1. Appellant did not raise breach of fiduciary duty as a defense in the Trial Court, nor did the Trial Court make any ruling affecting Appellant's remaining breach of fiduciary duty claims and the appeal should be denied and dismissed.

Appellant's first argument on appeal is that the transfer of the Notes and Deed of Trust from Lost Lake Resort Investment Group LLC to LLRIG TWO LLC was a breach of fiduciary duty rendering the transfer void. That argument fails for four (4) reasons: (1) It was not an argument made in the Trial Court, RAP 2.5(a); (2) The summary judgment order did not dismiss any claims for breach of fiduciary duty against Brent McCausland, who was the manager/member who executed the assignment; (3) RV was never a member of Lost Lake Resort Investment Group, LLC; and (4) RV has cited no authority for the proposition that if the transfers breached a fiduciary duty that they are void. Although the summary judgment order ruled that RV has no further claims in this action because the transfer from Wilson to RV of an interest in the Lost Lake Resort Investment Group LLC was void, Defendant Wilson, who did not appeal the summary judgment decision, still has a claim for money damages for breach of fiduciary duty against McCausland based upon the transfer of the Notes and Deed of Trust. (CP 11) A claim that there was a breach of fiduciary duty by

transferring the Notes and Deed of Trust requires as a condition precedent to such a claim that the transfer was valid. The Trial Court ruled that there was a valid transfer while leaving for determination at trial whether or not there was a breach of fiduciary duty, and if there was, the damages resulting from that breach.

2. The assignment of the Notes and Deed of Trust did not violate Paragraph 7.6 of the Operating Agreement and Appellant's arguments should be rejected and the Trial Court order affirmed.

RV next argues at page 10 of its opening brief that the transfer of the Notes and Deed of Trust violated the Operating Agreement of the Lost Lake Investment Group, LLC because it was a distribution in violation of paragraph 7.6 of the Operating Agreement. Paragraph 7.6 of the Operating Agreement states:

> No Member shall have any right to demand or receive any distribution from the company in any form other than cash, on dissolution or otherwise.

RV's argument that the transfer breached that provision fails for two (2) reasons. First, there is no evidence that suggests that the transfer of the Notes and Deed of Trust out of Lost Lake Resort Investment Group, LLC was a distribution of company assets. It was not. If Lost Lake Resort Investment Group, LLC ever owned the Notes and Deed of Trust it would have owed a debt of $500,000

to Block and McCausland. The transfer was made to extinguish the debt. It was not a distribution of company assets to a member because of Block and McCausland's membership interest. As a matter of law, it is not a distribution.

Second, the Operating Agreement doesn't prohibit transfers to members, it only provides that members don't have a *right to demand or receive distributions.* Whether members have a right to demand or receive distributions is irrelevant to the transfer in this case. The court is not deciding whether or not Block and McCausland had a right to demand or receive a distribution and 7.6 has no application to the issue.

RV also argues in part B of its opening brief that the transfer of the Notes and Deed of Trust to LLRIG TWO, LLC constitutes a violation of RCW 25.15.060. That argument was not made in the court below and is not ripe for decision. RAP 2.5(a). Further, RCW 25.15.060 only provides that creditors of an LLC may pierce the veil of the LLC to the same extent as a creditor of a corporation may pierce the veil of a corporation to obtain a judgment against the shareholders. That statute has no application to the issue before this court which is whether the transfer to LLRIG TWO, LLC followed the proper procedures to be valid.

3. RV's interpretation of the Operating Agreement on Appeal was not argued in the Trial Court should not be considered by this court and the Trial Court order should be affirmed.

In part C of its opening brief, RV argues first that the court should have considered paragraphs 6.2 and 7.1 of the Operating Agreement when deciding whether the transfer of the Notes and Deed of Trust required a majority of members or a majority of "disinterested members" to make the transfer valid. RV does not contest that members holding a majority of the ownership in the Lost Lake Resort Investment Group, LLC authorized the transfer of the Notes and Deed of Trust, but argues that the provisions of Operating Agreement paragraphs 6.2 and 7.1 and the repealed RCW sections 25.15.155 and 25.15.050 require a majority of disinterested members to approve an action by the LLC. This argument was not made below and is not properly before this court. RAP 2.5(a). RV neither cited any of those authorities nor argued that they required more than a majority of the members to approve the transfer of the Notes and Deed of Trust.

Further to the extent they may now argue the effect of Operating Agreement section 6.2, it is clear that provision has nothing to do with the approval of the transfer of the Notes and

Deed of Trust by a majority of the members of the LLC. Section 6.2 of the Operating Agreement deals with the powers of managers; the approval and transfer was done by the *members*.

The inapplicability of the repealed RCW 25.15.155 to the method of approval of the transfer of the Notes and Deed of Trust by a majority of the members is also obvious. That statute made managers and members liable to the limited liability company for profits or benefits derived without the consent of a majority of the disinterested managers or members. Even if the statute had been cited in response to the motion for summary judgment, it does not make actions taken void, it allows a cause of action for breach of fiduciary duty. The summary judgment order entered by Judge Price did not dismiss any breach of fiduciary duty claim. To the extent the statute applies, the remedy available under the statute is not precluded by the summary judgment order.

Last, in part C of its opening brief RV argues that paragraphs 7.3 and 7.4 of the Operating Agreement are in conflict and that since the transfer involves all or substantially all of the assets of Lost Lake Resort Investment Group, LLC, that a more stringent voting procedure should be adopted. Those arguments were not made below and should not be considered. RAP 2.5(a). Further,

the allegation that the transfer here was a transfer of all or substantially all of the assets of the LLC is not supported by any evidence and is merely an untrue bald assertion. Paragraph 7.4 of the Operating Agreement specifies how "meetings" of the members need to take place. RV does not argue that a majority of the members of the LLC did not approve the transfer of the Notes and Deed of Trust as 7.4 requires. RV's objection to the method of approval by the LLC fails.

RV's objection to the method of approval of the transfer of the Notes and Deed of Trust also fails because it was not a member of the LLC and was not even in existence at the time of the transfer. The court's ruling that RV has no interest in the LLC that has not been appealed precludes RV from making this argument.

4. RV's response to the summary judgment motion in the Trial Court did not raise equitable defenses to transfer of Notes and Deed of Trust and Appellant's new arguments on appeal should be ignored and the Trial Court order affirmed.

In part D of its opening brief, RV argues equitable arguments of constructive trust should have precluded a summary judgment determining that LLRIG TWO, LLC owns the Notes and Deed of Trust. That argument is frivolous. RV did not plead constructive trust as an affirmative defense in this case and more importantly, it

did not raise the doctrine of constructive trust as a defense to the summary judgment. LLRIG TWO, LLC pleaded and moved for summary judgment regarding ownership of the Notes and Deed of Trust on a constructive trust theory but none of the defendants responded to the summary judgment raising a constructive trust defense. Further RV's brief does not provide any argument as to how a constructive trust defense would have precluded summary judgment and the record has no facts from which a constructive trust defense could be based. The court below properly ruled that LLRIG TWO, LLC is the owner of the Notes and Deed of Trust should be affirmed and this appeal dismissed.

C. Multiple alternate grounds support plaintiffs' motion for summary judgment in the Trial Court and the Trial Court should be affirmed and this appeal dismissed.

LLRIG TWO, LLC moved for summary judgment determining that it owns the Notes and Deed of Trust on three (3) separate grounds. The summary judgment order does not limit the Trial Court's decision to any one of the three (3) grounds and this court should uphold the ruling on all three bases, including both the resulting trust and constructive trust grounds.

1. LLRIG TWO LLC Owns the Notes and Deed of Trust Under Resulting Trust

There is no dispute that Plaintiffs Block and McCausland put up the money to buy the Notes and Deed of Trust from Sterling Bank that are at issue in this case. There is no dispute that it was intended that the Notes and Deed of Trust were being purchased by Block and McCausland for themselves and not for the Lost Lake Resort Investment Group LLC. There is no dispute that Block and McCausland intended to put the Notes and Deed of Trust into a new limited liability company known as LLRIG TWO, LLC, which they formed for the purpose of holding the Notes and Deed of Trust. As such, the Notes and Deed of Trust are held by Block and McCausland in a resulting trust. *Thor vs. McDearmid*, 63 Wn. App. 193 (1991). There, the Court said, at pages 205 and 206:

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property...
>
> When property is taken the name of a grantee other than the person advancing the purchase money, *in the absence of other evidence of intent*, that grantee is presumed to hold legal title subject to the

> equitable ownership of the person advancing the consideration.

Plaintiffs Block and McCausland advanced the $500,000.00 to purchase the Sterling Bank Notes and Deed of Trust. Plaintiffs Block and McCausland intended to purchase the Notes and Deed of Trust for themselves. They were told by J. Mills that the seller Bank required the Notes and Deed of Trust to be placed in the Lost Lake Resort Investment Group, LLC but that it could be immediately transferred to another entity owned 100% by Block and McCausland. The e-mails between J. Mills and Block and McCausland clearly demonstrate the intent and the fact that Mills prepared an Assignment of the Notes and Deed of Trust that was signed on June 27, 2012, less than two months after the recording of the Assignment of the Notes and Deed of Trust from the Bank to Lost Lake Resort Investment Group, LLC demonstrates the intent that requires application of the resulting trust doctrine. Appellant did not dispute in the trial court and has not disputed on appeal that it was at all times intended that an entity owned by Block and McCausland would own the Notes and Deed of Trust. Placing ownership if the Notes and Deed of Trust through the remedy of a

resulting trust is appropriate and the trial court's summary judgment order should be affirmed on that basis.

In the Trial Court, RV argued, without any supporting authority, that the resulting trust doctrine could not apply here, because Block and McCausland/LLRIG TWO LLC did not supply all of the consideration for the purchase of the Notes and Deed of Trust. That argument fails for three reasons. First, there is no evidence in the record to support the claim of RV on appeal that any valuable consideration for the transfer came from Lost Lake Resort Investment Group LLC. While RV argues in its opening brief that the Lost Lake Resort Investment Group LLC held claims with a value of $3,000,000 against Sterling Bank, there is neither any evidence to support that in the record nor any explanation of any legal theory under which the Lost Lake Resort Investment Group held any claim against the bank.

Second, to the extent the facts of this case demonstrate that any indemnity was given by Lost Lake Resort Investment Group, LLC, it has been "repaid" by LLRIG TWO, LLC to Lost Lake Resort Investment Group. The document prepared by Defendant Mills transferring the Sterling Bank Notes and Deed of Trust from Lost Lake Resort Investment Group to LLRIG TWO, LLC requires LLRIG

TWO, LLC to hold Lost Lake Resort Investment Group harmless from the same claims from which Lost Lake Resort Investment Group agreed to hold Sterling Bank harmless. (CP 211, SCP Pending, Exhibit F) The agreement provides in relevant part as follows:

> **Section 2. Assumption.** Assignee hereby assumes and promises to perform in accordance with the terms thereof each and all of the duties and obligations of the Assignor arising from, in connection with, in respect of or under the Note and the other documents and interest assigned hereby, including but not limited to any and all obligations under the letter agreement dated March 25, 2010 from Golf Savings Bank to David Eastman.

(SCP Pending, Exhibit F).

The agreement to assume all of the liabilities of Lost Lake Resort Investment Group in connection with the Sterling Bank Notes effectively compensates the Lost Lake Resort Investment Group for any claimed consideration it had given it for the transaction. Even if LLRIG TWO, LLC had not undertaken the indemnity originally granted by the Lost Lake Resort Investment Group, the Statute of Limitations has now run on any claims that could have been brought against the bank that would involve the indemnity. Under the undisputed facts LLRIG TWO, LLC owns the Notes and Deed of Trust on a resulting trust theory.

Third, Appellant's argument in the Trial Court that a resulting trust could not be imposed by the Court because Lost Lake Resort Investment Group gave part of the consideration for the transfer of the Sterling Bank note consisting of a "hold harmless agreement" in favor of the bank is not supported by authority or consistent with Washington law.

The Doctrine of Resulting Trust is thoroughly discussed in *Engel v. Breske*, 37 Wn. App. 526, 681 P.2d 263 (1984). In that case, the Court reviewed a claim for resulting trust where the party requesting the resulting trust had put up less than all the consideration. The *Engel* Court clearly held that while putting all the consideration for the purchase of property creates a *presumption* of a resulting trust, that where a party can prove by clear, cogent and convincing evidence that the intention at the time of purchase of property is that it will be titled in someone other than the party intended to have the beneficial interest that a resulting trust is appropriate, even if all of the consideration was not given by the party for whom the resulting trust is created. The *Engel* Court stated, at pages 528 and 529:

A resulting trust is defined as follows:

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property. An essential element of a resulting trust is that there be an *intent* that the beneficial interest in property not go with the legal title... When the person asserting the trust has paid the consideration for the property, a presumption arises that a trust exists in that person's favor, absent evidence of a contrary intent... Where, as here, the purported beneficiary does not furnish all of the consideration for the property, no presumption of intent to create a trust arises. In such cases, the person asserting the trust has the burden of proving its existence by clear, cogent and convincing evidence.
>
> Assuming that Engel did pay some consideration for the property, the court's ruling simply reflects the fact that she did not pay all of it, and thus could not claim to be the *presumptive beneficiary* of a resulting trust. (Emphasis added, Citations omitted)

Engel, 37 Wn. App. at 528-529.

While Appellant can argue that since Lost Lake Resort Investment Group, LLC gave some consideration for the purchase of the Sterling Notes, in the form of an indemnity of the bank, and that therefore LLRIG TWO, LLC is not a *presumptive beneficiary* of a resulting trust under Washington law, Appellant has presented no evidence to refute the clear and undisputed testimony in support of Respondents' Motion for Summary Judgment that supports such a judgment on the theory of resulting trust. RV did not in the trial

court and on appeal does not contest the authority cited by LLRIG TWO, Block and McCausland in their trial court memorandum that a resulting trust arises whenever a person makes or causes to be made a disposition of property under circumstances which raise an inference that the person did not intend that the person or entity taking or holding property should have a beneficial interest. Respondents' original memorandum to the Trial Court, citing *Thor v. McDearmid*, 63 Wn. App. 193 (1991) concluded as one of the bases for the resulting trust the following specific quotation from that case:

> A resulting trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property. . .

Thor, 63 Wn. App. at 205.

The Declaration of Brent McCausland (CP 211, SCP Pending, *all exhibits*) consisting largely of documents prepared by defendant Mills clearly provides clear and convincing evidence that it was never intended that the Sterling Bank Notes and Deed of Trust would belong to Lost Lake Resort Investment Group, LLC. Rather, it was always intended that the Notes would immediately be

transferred to a new entity formed by Block and McCausland. The Declaration of Brent McCausland, (CP 214) and the e-mails from Mills to Block and McCausland attached as Exhibit "D" (SCP, Pending) as well as the Assignment and Assumption Agreement attached to the McCausland Declaration as Exhibit "F" (SCP, Pending) make it absolutely clear that the intention of the parties at the time of the purchase of the Notes and Deed of Trust was that the beneficial interest in the property not go with the legal title in Lost Lake Resort Investment Group, LLC, but would be in LLRIG TWO, LLC. There is no evidence to the contrary in the record. Respondents' satisfied in the Trial Court the clear, cogent and convincing evidence test by the documents created by defendant Attorney Jay Mills. Summary Judgment on the resulting trust theory was appropriate in the Trial Court and should be affirmed by this Court on appeal. This Court should uphold the Trial Court's decision that LLRIG TWO, LLC is the owner of the Sterling Bank Notes and Deed of Trust and dismiss Appellant's appeal.

2. LLRIG TWO, LLC owns the Notes and Deed of Trust under Constructive Trust, there was no defense of Constructive Trust asserted by Appellant in the Trial Court and the Trial Court should be affirmed and this appeal dismissed.

The Trial Court's decision should also be affirmed on a constructive trust theory. A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if permitted to retain it. *Brooke v. Robinson*, 125 Wn. App. 253 (2004). In *Brooke*, the Court said, at page 257:

> A constructive trust arises in equity "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." A person is unjustly enriched when he or she profits or enriches himself or herself at the expense of another contrary to equity. The question is whether the enrichment is unjust, not just whether the holder of the property acted with bad motive or malicious intent. Constructive trusts "arise independently of the intention of the parties, and they arise even though acquisition of the property is not wrongful."

In the instant case, Plaintiffs Block and McCausland and not Lost Lake Resort Investment Group, LLC, spent $500,000 to purchase the Notes and Deed of Trust from Sterling Bank. They also spent in

excess of $1,000,000 (CP 211 at 216) improving the infrastructure of the Lost Lake Resort property to make sales of lots in the development based on their ownership of the real property after purchasing Lost Lake Resort, LLC, the owner of the 85 acres of real property developed for sale, and by their ownership of the Notes and Sterling Bank Deed of Trust through LLRIG TWO, LLC via the assignment to that company. Under the Doctrine of a Constructive Trust, any interest Lost Lake Resort Investment Group, LLC ever had in the Notes and Deed of Trust was subject to a Constructive Trust, placing the title in the names of Block and McCausland. Lost Lake Resort Investment Group has never repaid the $500,000.00 that Block and McCausland paid for the Sterling Bank Notes and Deed of Trust.

In July 2015, LLRIG TWO, LLC offered to sell the Notes and Deed of Trust to Lost Lake Resort Investment Group for the $500,000.00 that was paid for the Notes and Deed of Trust plus statutory interest of 12% to the date of purchase and gave Lost Lake Resort Investment Group forty-five (45) days to complete the purchase. (CP 249) Each of the members of Lost Lake Resort Investment Group, other than defendants Wilson/RVRM agreed to fund his share of the purchase price. (CP 249) Defendants

Wilson/RVRM, through their alleged proxy, Jeff Graham, who attended the meeting of Lost Lake Resort Investment Group where the offer was made, voted against accepting the offer to purchase. (CP 249) Despite the vote of Jeff Graham, Lost Lake Resort Investment Group passed the resolution to purchase the Notes and Deed of Trust if each of the members tendered his share of the purchase price to the company. (CP 249) The sale failed because defendants Wilson/RVRM failed to fund their share of the purchase. (CP 249) It is obviously defendants'/Appellant's position that Lost Lake Resort Investment Group should own the Sterling Bank Notes and Deed of Trust without paying for them. It would be unjust enrichment for Lost Lake Resort Investment Group to own the beneficial interest in the Sterling Bank Notes without paying for them. The Trial Court's ruling that LLRIG TWO owns the Notes and Deed of Trust can be upheld on a constructive trust theory solely because it would be unjust enrichment for the Lost Lake Resort Investment Group to hold the Notes and Deed of Trust without paying for them.

Upholding the Trial Court's summary judgment on the basis of Constructive Trust is also appropriate because it was always intended that Block and McCausland or their solely-owned

company would own the Notes and Deed of Trust. In *Re Estate of Krappes*, 121 Wash. App 653, 91 P. 3d 96, (2004) There, the court held that a constructive trust is appropriate when the title holder is not the intended beneficiary. There the court said at page 664:

> "Where for any reason, the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. A Trial Court may impose a trust where there is clear, cogent and convincing evidence supporting it. Although Trial Courts often impose constructive trusts because of fraud, misrepresentation, bad faith or overreaching, these are not pre-requisites; "the courts have imposed constructive trusts when the evidence established the decedent's intent that the legal title holder was not the intended beneficiary."

In Re Estate of Krappes, 121 Wn. App. 653 at 664.

It is undisputed that Lost Lake Resort Investment Group was not the intended beneficiary of the Notes and Deed of Trust at purchase. In addition to the fact that summary judgment was appropriate on a constructive trust theory because it would be unjust enrichment for the Lost Lake Resort Investment Group to own the Notes and Deed of Trust, LLRIG TWO, LLC should be the owner because it was always intended that it be the owner. The Trial Court should be upheld because LLRIG TWO, LLC owns the Notes and Deed of Trust for two separate reasons: on a

Constructive Trust theory; intent and equity. This appeal should be dismissed.

IV. CONCLUSION

The Appellant has appealed in the name of an entity that has no standing to assert any claim in this appeal. Appellant has failed to cite to the record for any issue or any fact asserted in its brief. Appellant has asserted all new claims and issues not raised in the Trial Court. Appellant's appeal should be dismissed and the Trial Court's order on summary judgment affirmed.

Substantial evidence without factual dispute supports the Trial Court's decision that Respondents Block and McCausland complied with the Lost Lake Resort Investment Group, LLC Operating Agreement in the transfer of the Sterling Notes to LLRIG TWO, LLC. Appellant never asserted, and the Trial Court did not rule on any claim of breach of fiduciary duty, and that issue remains in the case as a counterclaim by defendant. Regardless of the fact that virtually all of the arguments now asserted on appeal were not raised by Appellant in the Trial Court, the transfer of the Sterling Notes and Deed of Trust from Lost Lake Resort Investment Group, LLC to LLRIG TWO, LLC, complied with the Operating Agreement.

Not only the Operating Agreement itself, but multiple other legal bases support the Trial Court's order on summary judgment establishing that LLRIG TWO, LLC is the lawful owner of the Sterling Notes and Deed of Trust. Respondent's record supporting Resulting Trust and Constructive Trust establish LLRIG TWO, LLC's legal right to the Sterling Notes and Deed of Trust on multiple bases. There is no record in the Trial Court or before this Court which creates any genuine issue of material fact as to either of those theories of recovery. The record is clear and the law in Washington is clear that under theories of Resulting Trust and Constructive Trust LLRIG TWO, LLC should hold the Sterling Notes and Deed of Trust.

This Court should affirm the Trial Court and dismiss this appeal.

Respectfully submitted this 16th day of November, 2016.

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per telephonic approval

NO. 49069-2-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

LLRIG TWO, LLC, et al

Respondents,

v.

LEE and LORI WILSON,

Appellants.

DECLARATION OF SERVICE

I, VEA STEPPAN, do hereby make this Declaration under penalty of perjury in accordance with the laws of the State of Washington.

I am the legal assistant to Daniel R. Kyler, one of the attorneys representing Respondents in the above-entitled cause.

On November 16, 2016 I caused to be served, via ABC-Legal Messenger Service and e-mail, the following:

1. Brief of Respondents

2. Motion to Strike Clerk's Papers Designated by Appellant Inconsistent with RAP 9.12;

3. Declaration of Daniel R. Kyler in Support of Motion to Strike Clerk's Papers Designated by Appellant; and

4. Supplemental Designation of Clerk's Papers/Exhibits

on the following person:

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This Declaration is made under penalty of perjury in accordance with the laws of the State of Washington that the foregoing and within are true and correct.

Signed at Tacoma, Washington, this 16 day of November, 2016.

Vea Steppan

Vea Steppan